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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 466

WEST TEXAS UTILITIES COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 179-186) is reported at 184 F. 2d 233. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 35-108) are reported at 85 NLRB 1396.

JURISDICTION

The decision of the court below was rendered on July 10, 1950, and a petition for rehearing was denied on September 28, 1950. The petition for a writ of certiorari was filed on December 21, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10 (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

Section 9 (h) of the National Labor Relations Act, as amended, provides that the Board shall not issue a complaint upon a charge filed by a labor organization unless the officers of that labor organization "and the officers of any national or international labor organization of which it is an affiliate or constituent unit" have filed the "non-communist" affidavit prescribed in that Section. At the time the employer refused to bargain with the local union here involved the officers of the local and the international union with which it was affiliated had filed the affidavits required by Section 9(h), but the officers of the parent federation, the A. F. L., had not. By the time the Board's complaint was issued the officers of the A. F. L. had also filed affidavits. The following questions are presented:

1. Whether the A. F. L. is a "national or international labor organization" whose officers were required by section 9(h) to file the non-communist affidavits as a condition to invocation of the Board's processes by the local union.

2. Whether the fact that a union, although in compliance with section 9(h) when the Board issued its complaint, was not in compliance at the time of a refusal to bargain, relieves an employer of his statutory duty to bargain.

3. Whether the employer's refusal to bargain is excused by the fact that he relied upon the view of the General Counsel that Section 9 (h) applied to federations such as the A. F. L.

4. Whether, where a union was represented by a majority of the employees prior to the commission of an unfair labor practice, and thereafter lost its majority, the Board could properly remedy the unfair labor practice by requiring the employer to bargain.

STATUTES INVOLVED

The statutory provision principally involved is Section 9 (h) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151, *et seq.*). The pertinent provisions are set out in the Appendix, *infra,* p. 14.

STATEMENT

In August 1946, following representation proceedings before the Board, three locals (hereinafter collectively referred to as "the Union") of the International Brotherhood of Electrical Workers, affiliated with the A.F.L., were certified as collective bargaining representative of petitioner's employees (R. 57-59). On September 19, 1947,[1] eleven days prior to a scheduled bargaining conference, petitioner informed the Union that petitioner would not bargain with it because of an announcement by the General Counsel of the Board that a local union, affiliated through its international with the A.F.L., could not utilize the facilities of the Board in the absence of the filing by A.F.L. officers of the non-communist affidavits prescribed in

[1] All events hereinafter mentioned occurred in 1947, except as otherwise specifically noted.

Section 9 (h) of the Act (R. 37-38; 123-125). At this time the officers of the Union and of the international had filed the affidavits in question but the officers of the A.F.L. had not (R. 38).

On October 7, the Board, in *Northern Virginia Broadcasters,* 75 NLRB 11, contrary to the previously expressed view of the General Counsel, held that Section 9 (h) did not in the ordinary case require affidavits from officers of parent federations such as the A.F.L. The Union advised petitioner of this decision, and petitioner agreed to meet with the Union on November 10 (R. 38; 126). On November 8, however, petitioner determined that the Union no longer represented a majority of the employees, and advised the Union that petitioner would not meet further with the Union for purposes of collective bargaining until the Union's status as representative of the employees had been established (R. 75; 124, 128-129). The Union thereupon filed unfair labor practice charges with the Board (R. 75).

Upon these facts the Board concluded that petitioner's admitted refusal to bargain on September 19 violated Section 8 (a) (5) of the Act, as amended. The Board, adhering to its consistent administrative interpretation first announced in *Northern Virginia Broadcasters, supra,* held that parent federations such as the A.F.L. were normally not included in the phrase "national or international labor organization" as used in Section 9 (h), so that the failure of the A.F.L. officers to file

non-communist affidavits was no defense to petitioner's refusal to bargain (R. 38-39). The Board likewise rejected petitioner's defense that it "acted upon the erroneous belief that the Union was not in compliance, because of a mistaken interpretation of the new statute by the General Counsel" (R. 39). The Board observed that petitioner's mistake of law did not absolve it from responsibility for its unlawful conduct, and also noted that the General Counsel had not been vested with authority to make binding interpretations of the meaning of the Act (R. 39). Having found an unlawful refusal to bargain as of September 19, the Board held that any loss of majority occurring between that date and November 8 must be attributed to the unfair labor practice, so that petitioner's refusal to bargain on and after November 8 was likewise violative of the Act (R. 39-40). The Board accordingly ordered petitioner to cease and desist from the unfair labor practices found and to bargain with the Union upon the latter's request (R. 42-43).

The Court of Appeals, one judge dissenting, granted enforcement of the order (R. 179-186).

ARGUMENT

1. The Board rested its decision that petitioner was not relieved of its obligation to bargain during the period of the A. F. L.'s failure to file non-communist affidavits entirely upon the proposition that Section 9 (h) does not apply to parent federations. The court below sustained the Board's interpretation of Section 9 (h) in this respect, and to

this extent its holding is squarely in conflict with that of the Fourth Circuit in *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 184 F. 2d 98, pending on petition for writ of certiorari, No. 425, this Term. For reasons which we have indicated in our petition in the *Highland Park* case, we believe that that issue is one of general importance in the administration of the Act which this Court should resolve.

Determination of that question, however, will not necessarily dispose of the present case, for the Board's order here may be supportable on an alternative ground. In the instant case, the officers of the federation had filed the affidavits by the time the Board's complaint issued, whereas in the *Highland Park* case the officers of the federation had not filed affidavits by the time the complaint issued. Thus, even assuming Section 9 (h) to be read as requiring federations such as the A. F. L. and the C. I. O. to file non-communist affidavits, there is no doubt that the complaint could properly issue in this case, since at the time of its issuance the union was unquestionably eligible to avail itself of the Board's processes. The question is accordingly presented whether the requirement of Section 9 (h) relates merely to the eligibility of the union to invoke the Board's processes, or whether that requirement is in effect one of substantive law which excuses an unfair labor practice if the union was not in compliance at the time of the unfair labor practice. The court below took

the view that compliance with Section 9(h) by a labor organization affects only the duty of the Board to act, and does not affect an employer's obligation to bargain. For this reason, the court, as an alternative ground of decision, held that, even if it be assumed that the union was not in compliance with Section 9(h) at the time of the refusal, the employer's refusal to bargain was a violation of the Act.

This alternative holding of the court below poses a question on which the Board has not yet definitively passed. In *New Jersey Carpet Mills Co.,* 92 NLRB No. 122, 27 LRRM 1114, decided December 11, 1950, the Board, overruling its previous decision in *Andrews Company,* 87 NLRB 379, approved by a divided vote the view of the court below that the fact that a union was not contemporaneously in compliance with Section 9 (h) did not necessarily relieve an employer of his obligation to bargain, and, on the facts before it, directed the employer to bargain with a union which had come into compliance by the time the complaint was issued. In the *New Jersey* case, however, the employer had not contemporaneously relied on the noncompliance as a ground for refusing to bargain. Chairman Herzog, in his concurring opinion, stated that should a case arise in which noncompliance was the actual ground for the refusal to bargain he would, "in the interest of effectuating the policies of the Act," find no violation. The other two members of the

majority expressly reserved judgment on such a case, and neither of the two dissenting members indicated whether, if bound by the holding in the *New Jersey* case, he would, in a case presenting the issue, draw the distinction suggested by the Chairman.

It thus is apparent that the Board has not decided whether an employer violates the Act by refusing to bargain where, as here, the refusal is expressly based upon the contemporaneous noncompliance with Section 9(h) of a union which has later complied. Nor has it decided whether, if such a refusal violates the Act, the Board would deem a bargaining order appropriate in such a case to "effectuate the policies of this Act" (Section (10(c); see *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 193-5; cf. *National Labor Relations Board* v. *Indiana and Michigan Electric Company,* 318 U.S. 9). Since both questions present issues of "statutory policy" (*National Labor Relations Board* v. *Jones & Laughlin Co.,* 331 U.S. 416, 428) which it is for the Board to determine, at least in the first instance (cf. *Packard Co.* v. *National Labor Relations Board,* 330 U.S. 485, 492-3), we believe that orderly administration of the Act would require consideration and disposition of these questions by the Board prior to their consideration by this Court (*National Labor Relations Board* v. *Jones & Laughlin Co., supra,* at 428; cf.

Securities and Exchange Commission v. *Chenery Corp.*, 318 U.S. 80, 88).

Accordingly, while we would not object to a grant of certiorari limited to the question presented by the *Highland Park* case (the first question presented by the petition herein), this Court may deem it more appropriate to hold this case on its docket until final disposition of the *Highland Park* case. If the judgment in that case is reversed, the judgment below can be left in effect either by affirmance or by denial of certiorari. If the judgment in *Highland Park* is affirmed, it would then be appropriate for this Court to grant the writ and direct that the instant case be remanded to the Board for its determination of the unresolved questions of statutory policy referred to above.

2. Petitioner's contention that, even though the Board correctly held that Section 9 (h) does not apply to federations, petitioner may not be held responsible for its refusal to bargain with the Union because it acted upon the General Counsel's contrary interpretation of the Section presents no question warranting review by this Court. Apart from any question as to the General Counsel's authority to bind the Board, settled law establishes that even reliance upon an earlier interpretation or policy of a governmental agency itself is no defense to a violation of the statute if the agency later reverses its position. *United States* v. *San Francisco*, 310 U. S. 16, 31-32; *Utah Power & Light Co.*

v. *United States,* 243 U. S. 389, 408-409; *National Labor Relations Board* v. *Baltimore Transit Co.,* 140 F. 2d 51, 54-55 (C.A. 4), certiorari denied, 321 U. S. 795; cf. *Payne* v. *Houghton,* 22 App. D. C. 234, 249, affirmed, 194 U. S. 88, 100; *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 123 F. 2d 155, 162 (C. A. D. C.), certiorari denied, 315 U. S. 806. The government is not estopped by the acts of its agents; when Congress desires to extend protection to those who rely on administrative interpretations, it expressly so provides.[2]

3. In holding that the Board properly attributed any loss of majority which followed the refusal to bargain to that unfair labor practice, the court below correctly applied a principle long established by this Court (*National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 339-340; *Medo Photo Corp.* v. *National Labor Relations Board,* 321 U. S. 678, 682-683, 687), and repeatedly followed by the courts of appeals (see *e.g., Great Southern Trucking Co.* v. *National Labor Relations Board,* 139 F. 2d 984, 985-986 (C.A. 4), certiorari denied, 322 U. S. 729, and cases there cited; *Oughton* v. *National Labor Relations Board,* 118 F. 2d 486, 497 (C.A. 3)). Contrary to petitioner's

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[2] See Sections 9 and 10 of the Portal to Portal Act of 1947, 61 Stat. 84, 29 U. S. C., Supp. III, 258, 259; Section 205 (d) of the Emergency Price Control Act, 56 Stat. 33, 50 U. S. C. App. 925 (d); Section 20 (d) of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79t (d). There is no comparable provision in the National Labor Relations Act.

assertion, the Board is not required to establish by direct evidence that the loss of majority was in fact occasioned by the unfair labor practice. The cases cited establish that an employer's refusal to bargain necessarily undermines employee support of a union, and that at least in the absence of proof to the contrary, the Board may reasonably conclude that the loss of majority was occasioned by the refusal to bargain. Here as in *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C.A. 2), certiorari denied, 304 U. S. 576, the employer having committed an unfair labor practice, "it rested upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune."

Moreover, quite apart from the presumption that the loss of majority was in fact attributable to the refusal to bargain, the Board's order requiring petitioner to bargain with the Union is an appropriate remedy for the unfair labor practice committed. *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U. S. 702, 704-705; *National Labor Relations Board* v. *P. Lorillard Co.,* 314 U. S. 512, 513; *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 82.[3] The question which petitioner seeks to raise

[3] On this proposition *Superior Engraving Co.* v. *National Labor Relations Board,* 183 F. 2d 783 (C.A. 7), now pending on petition for certiorari, No. 434, this Term, with which the Company claims conflict, is in accord with the holding of the court below. In that case, where, as here, the employer contended that the union's loss of majority stemmed from factors

is thus well-settled and does not warrant further review.

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other than the employer's refusal to bargain, the court enforced the Board's bargaining order on the ground that "whether an employer should be required to bargain with a particular union previously selected by its employees or whether, in view of lapse of time and changed conditions, a new election should be held, is one for the Board to decide" (183 F.2d, at 793). Since the holdings of the Seventh Circuit and of the court below are in accord, the fact that the *Superior Engraving* opinion contains language disapproving the presumption that loss of majority following an unfair labor practice is attributable to the unfair practice does not create a conflict warranting resolution by this Court.

CONCLUSION

The petition for a writ of certiorari presents only one question of general importance which is now ripe for review. That question is presently pending before the Court in No. 425. Decision of this question, however, will not necessarily dispose of this case, but may, for reasons indicated above, require a remand to the Board for its determination of additional questions of statutory policy on which it has not yet passed. Accordingly, we suggest that this Court retain the present petition on is docket pending disposition of No. 425.

Respectfully submitted,

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JANUARY, 1951

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, 151, *et seq.*), are as follows:

* * * * *

SEC. 9. * * *

* * * * *

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

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OCTOBER TERM, 1950

No. 466

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Petitioner,

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NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPLICATION TO WITHDRAW REPLY BRIEF AND FILE SUBSTITUTE REPLY BRIEF

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPLICATION TO WITHDRAW REPLY BRIEF AND FILE SUBSTITUTE REPLY BRIEF

To the Honorable Chief Justice of United States and to the Honorable Associate Justices of the Supreme Court of United States:

Petitioner respectfully requests permission to withdraw its reply brief heretofore filed herein and substitute therefor another reply brief to be filed with the Court as of this date.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY MEMORANDUM FOR PETITIONER, WEST TEXAS UTILITIES COMPANY, INC.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM FOR PETITIONER, WEST TEXAS UTILITIES COMPANY, INC.

To the Honorable Chief Justice of United States and to the Honorable Associate Justices of the Supreme Court of United States:

The amazing position taken by the Solicitor General in his memorandum for the National Labor Relations Board filed in this case impels us to file this reply.

The Board's attorney apparently decided at the last moment to file a petition for writ of certiorari in the case of *N. L. R. B. v. Highland Park Manufacturing Company, No. 425*, decided by the United States Court of Appeals for the Fourth Circuit, which was decided September 2, 1950, after it became a certainty that this case involving the

same point would be brought before this Honorable Court. Now, after petitioning this Court in that case, he suggests alternative methods of handling this case before this Honorable Court depending upon the outcome of the Highland Park case, even to the extent of suggesting this case be remanded back to the National Labor Relations Board for it to decide the question raised under Petitioner's Points II and III set forth in its petition.

This seems wholly inconsistent with the sound, judicial principle of ending confusion in the interpretation of statutory law. It may be a fine thing for attorneys at the bar to skirmish over a case just to achieve some degree of victory, but we are doubtful of the wisdom of such actions when the very welfare of so many men is affected thereby. The good faith and equities reflected in the record in this case on the part of both the Petitioner and its employees is deserving of having this Honorable Court settle the issues of law raised upon the merits of this case and not upon the facts of another case.

For over two years the overwhelming majority of the employees of Petitioner have been seeking an election to determine whether or not the Union will represent them. For over two years Petitioner has sought only to have a fair and honest determination of this issue. Out of all the unfair labor practices originally charged against the Petitioner, the only issue remaining is that of the legal interpretation of the "non-compliance" section of the Labor Act. There remains no dispute as to the facts. The Petitioner was fully exonerated by the Board of all other charges ·led against it.

There is another reason that the suggestions made by counsel for the Board are without merit. First he assumes that the AFL came into compliance with Sec. 9(h) of the Act between September 19, 1947 — the date of Petitioner's admitted refusal to bargain with the Union — and June 24, 1948 — the date upon which the complaint was issued, but the record in this case contains no evidence that such compliance was effected by the AFL during this period. The matter was never litigated because the Union and the Board at all times until the case reached the Court of Appeals contended only that the AFL is not required to comply with Sec. 9(h) at all. Only in the Court of Appeals did the Union, but not the Board, advance for the first time the contention that the AFL came into compliance after September 19, 1947, and was for that reason entitled to utilize the facilities of the Board. Moreover, if this Court is now to go outside this record to determine the fact, Petitioner will show that the affidavits alleged to have been filed by Messrs. Green and Meany on November 7, 1947, did not constitute compliance with the requirements of Sec. 9(h), and that they were the result of a scheme to circumvent the requirements of Sec. 9(h) whereby the AFL convention, without changing the duties of its officers, stripped from its Executive Council members their titles as Vice Presidents of the AFL. This action was frankly taken only because one of the Vice Presidents, John L. Lewis, refused to sign the Section 9(h) affidavit, thus preventing the AFL from effecting compliance.[1] We do not suggest that this Court should now go outside the record to deter-

[1] Appendix 1.

mine these unlitigated questions. Rather we urge that, since the matter was never litigated, the Court of Appeals not only erred in undertaking to decide the question when raised for the first time there by the intervenor Union, but it erred in its conclusions on this point also.

Both counsel for the Board and for the Union go to great length in attempting to explain away the effects of the decision in the *New Jersey Carpet Mills, Inc., case 92 N. L. R. B., No. 22; 27 L. R. R. M. 1114*, upon the petition for writ of certiorari in this case. The case was decided too late for Petitioner to refer to it in its petition for this writ. The case more than accentuates the importance of the question of law raised under Points II and III of the petition for writ in this case. In that case the three to two decision follows some of the reasoning of the court below in this case, but Chairman Herzog of the Board, in writing the opinion, emphatically stated that, if the facts were those prevailing in this case, the Board's decision would be in direct conflict with the decision of the Court of Appeals for the District of Columbia upon the point of law raised by Petitioner under Points II and III of its petition for writ of certiorari. While, technically speaking, such conflict within itself may not be reason for this Honorable Court to take cognizance of the issue, yet it removes all doubt about the importance of the question. It is interesting to note that all of the members of the Board acknowledge that the issue involves the very fundamental nature of the "compliance" section of the Act.

As pointed out in the petition for writ, we regard the question of the right of an employer to refuse to bargain

with a non-complying union as being of actually greater importance to the proper administration of the Labor Relations Act than even is the question of whether the section applies to the officers of the American Federation of Labor or the Congress of Industrial Organization. This is obvious because the former could effectively nullify the section itself, whereas the latter would leave only a "missing link in the chain" aimed at stopping Communist infiltration into the ranks of labor.

In answer to the Union's contention that the dissenting members of the Board in the *New Jersey Carpet case* did not discuss the opinion of the court below on this point, we should like to quote from the dissenting opinion in that case:

> "We are aware that the dissenting portion of our opinion is contrary to the decision of the Court of Appeals for the District of Columbia in the West Texas Utilities case, supra. However, the precise question before us here and in the Andrews case with which the Court disagreed *was not the principle question on which the Court was briefed by the Board.* Had it been, we are of the opinion that the Court would not have stated that 'The Act's only sanction for noncompliance is denial of Board facilities,' for we think it well established that noncompliance also results in the loss of certain substantive rights. Thus, for example, as we have indicated, noncompliance results in the loss of the substantive right, among others, to act as exclusive bargaining representative, which in turn deprives the noncomplying union of the benefit of secondary strike activity and the protection of union-security provisions in its bargaining contracts. It is interesting to note in this connection that, although the majority opinion herein relies upon the West Texas Utilities case, Chairman Herzog never-

> theless deviates from the decision in that case to the extent that he believes it necessary to effectuate congressional policy as embodied in Section 9(f), (g), and (h). Accordingly, with due deference to the Court's opinion in the West Texas Utilities case, we would adhere to the position taken in the Andrews case." (Italics supplied.)

The Board's suggestion to defer action on this petition is also based upon its assertion that apart from the Section 9(h) issues there are no other issues in this case which warrant further review by this Court. It states (Memo., p. 10):

> "3. In holding that the Board properly attributed any loss of majority *which followed* the refusal to bargain to that unfair labor practice, the Court below correctly applied a principle long established by this Court." (Italics supplied.)

But this statement of the proposition assumes a state of fact which finds no evidential support in this record and is refuted by all the evidence in the record.

The Board asserts that the Union's loss of majority followed Petitioner's September 19, 1947, refusal to bargain.[2] There is not one shred of evidence in the record to support this assertion. There is an abundance of evidence which shows that the loss of majority occurred prior to the refusal to bargain on September 19, 1947.

In these circumstances, we urge that an important question in the administration of the Act is presented: May the Board presume a fact — i. e., the causal relationship be-

[2] See also the Board's formulation of the 4th Question Presented. (Memo. p. 3.)

tween an employer's refusal to bargain and a union's loss of majority — without any evidence, substantial or otherwise, to support the presumption and in the face of evidence which wholly negates the possibility of such a causal relation? An affirmative answer to this question was not, in our reading of the cases, ever established by this Court under the Wagner Act and, in any case, the question cannot be so answered in the light of the 1947 amendments to that Act. It is wholly separate from the question of statutory interpretation of Section 9(h) and independently warrants issuance of the writ requested.

CONCLUSION

For the reasons heretofore stated and here supplemented, Petitioner respectfully prays as heretofore prayed in its petition for writ of certiorari.

Respectfully submitted,

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